Supreme Court, U.S.
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No. 06-

In the
Supreme Court of the United States

JACQUE HOLLANDER,

Petitioner,

vs.

JAMES BROWN and
JAMES BROWN ENTERPRISES, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are three questions presented:

1. Whether the State of Illinois' application of the discovery rule and equitable estoppel doctrines in a manner which fails to toll the statute of limitations for personal injury in a case of sexual assault and threats of death fails to provide due process of law, and also fails to provide equal protection to women, and so violates the Fourteenth Amendment and 42 USCS § 13981.

2. Whether the State of Illinois' two-year statute of limitations that includes sexual assault as a personal injury subject to the same limitations as other personal injuries, fails to provide due process of law, and fails to provide equal protection to women, and so violates the Fourteenth Amendment and 42 USCS § 13981.

3. Whether the decisions of the Illinois Supreme Court and the United States Court of Appeals for the Seventh Circuit create a precedence that violates due process of law and creates a dangerous public policy.

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OPINIONS BELOW

This case originated in the United States District Court for the Northern District of Illinois, Eastern Division, case number 05-CV-57. The United States Magistrate Court issued its unpublished memorandum opinion and order in this case on June 28, 2005 dismissing Petitioner's case pursuant to Supreme Court Rule 12(b)(6). A copy of that opinion and order are attached hereto as Appendix A. On August 9, 2006, the United States Court of Appeals for the Seventh Circuit issued a published opinion affirming the District Court's decision. A copy of that opinion is attached hereto as Appendix B.

JURISDICTION

This matter comes to the Honorable United States Supreme Court for review pursuant to 28 U.S.C. §1254(1) as on appeal directly from a ruling of the United States Court of Appeals for the Seventh Circuit that was decided on August 9, 2006. Notice was sent pursuant to USCS Supreme Ct R 29.

28 U.S.C. § 2403(b) may apply in this matter. Accordingly, notice was also sent to the Attorney General for the State of Illinois pursuant to USCS Supreme Ct R 29.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Fourteenth Amendment to the United States Constitution, USCS Const. Amend. 14, § 1, provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Federal Statutory Provisions

United States Code 42 USCS §13981(b), the Violence Against Women Act, provides, in relevant part, "All persons within the United States shall have the right to be free from crimes of violence motivated by gender. . . ."

C. State Statutory Provisions

The Illinois statute of limitations for personal injury, 735 ILCS 5/13-202, provides, in relevant part, "Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, except damages resulting from first degree murder or the commission of a Class X felony and the perpetrator thereof is convicted of such crime, shall be commenced within 2 years next after the cause of action accrued . . . . "

STATEMENT OF THE CASE

On January 5, 2005 Petitioner filed a five-count complaint against Respondents alleging false imprisonment, sexual assault and battery, intentional infliction of emotional distress and negligence against the celebrity James Brown; and for negligence and respondeat superior against James Brown enterprises, the corporation that handled his business affairs. The allegations were based on an act of rape perpetrated on Petitioner by James Brown in 1988. Petitioner did not know that she was

permanently injured from the rape until 2003 when she was diagnosed with Graves Disease and advised that the disease was a direct result of the 1988 rape. It was within two years of that diagnosis that she filed the lawsuit in this case. Petitioner also properly pled that Respondent James Brown threatened to have her killed if she told anyone about the rape. Federal jurisdiction was conferred pursuant to 28 U.S.C. § 1332 under diversity of citizenship for an amount in question that exceeds $75,000.

Respondents argued that Illinois' two-year statute of limitations barred the filing of a civil suit for personal injury, including a lawsuit based on sexual assault. Petitioners argued that the unique circumstances of the sexual assault and the lack of manifestation of symptoms of the Graves Disease until years after the rape should toll the statute of limitations pursuant to the discovery rule doctrine that recognizes a tolling of the statute of limitations until the Plaintiff knows, or should reasonably know, of the injury and that the injury was wrongfully caused." *Sister Marie Golla, v. General Motors Corporation*, 167 Ill. 2d 353; 657 N.E.2d 894; 1995 Ill. LEXIS 184; 212 Ill. Dec. 549 (1995.)

Petitioner also argued that the statute of limitations should be tolled for public policy and estoppel reasons due to the death threats made by Respondent James Brown, and reasonably believed by Petitioner, that restrained Petitioner from filing the lawsuit within the statutory period.

The United States District Court ruled that the discovery rule doctrine, as it is applied in Illinois, did not toll the statute of limitations in this case. The Court determined that rape constitutes a traumatic event that gives rise to an obvious injury and immediate notice of the victim's right to sue. The Court reasoned that it was

axiomatic for a rape victim to immediately know that they were injured and entitled to legal recourse.

In the absence of authority, the District Court further refused to toll the statute of limitations based on the allegation of "death threats" because, in the District Court's opinion, that would create a precedent that could, ". . . open the classic 'Pandora's Box' of stale claims."

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. The Appellate Court also ruled against Petitioner. In its ruling the Appellate Court held that Illinois law does not apply the discovery rule doctrine where the Plaintiff has cause to know of their injury, but not of its full manifestation. *Jacque Hollander, v. James Brown and Brown Enterprises, Incorporated*, 457 F.3d 688, 692; 2006 U.S. App. LEXIS 20429 (2006). The Court interpreted the facts in this case such that, without an allegation of repressed memory or unawareness of the sexual assault, the slow manifestation of symptoms from the sexual assault, under Illinois law, did not delay Petitioner's immediate constructive notice of her legal rights at the time she was raped.

The Appellate Court expressed no opinion but relied solely upon the Illinois Supreme Court decision in *Gina Trimble Parks et al., v. Raymond Kownacki*, 193 Ill. 2d 164; 737 N.E.2d 287; 2000 Ill. LEXIS 1212; 249 Ill. Dec. 897 (2000) for its decision that the statute of limitations was not tolled on the basis of estoppel due to James Brown's death threats. Although the court noted that it, "expressed no view on whether the Parks decision was the correct approach or on whether it applied the doctrine of equitable estoppel correctly to the facts before it", the Appellate Court ruled that it was bound by the Parks holding that the doctrine of equitable estoppel in the State of Illinois only applies to misrepresentations or concealments made by defendants to cause a delay in

litigation, not to threats of reprisal that influence the plaintiff into delaying their lawsuit, and so held that the statute of limitations would not be tolled on any estoppel basis. Neither the Appellate Court nor the Illinois Supreme Court in Parks considered the public policy issues raised in this case.

Commensurate to their findings, the Appellate Court affirmed the District Court opinion to dismiss the action with prejudice.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS NECESSARY TO DECIDE WHETHER THE STATE OF ILLINOIS' STATUTE OF LIMITATIONS LAW, OR THE ILLINOIS SUPREME COURT'S HOLDING WITH RESPECT TO THE APPLICATION OF THE DISCOVERY RULE AND EQUITABLE ESTOPPEL DOCTRINES TO TOLL THE STATUTE OF LIMITATIONS, VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE VIOLENCE AGAINST WOMEN ACT.

A. Introduction

As this Court has repeatedly made clear, no state can create or administer laws that deny due process or fail to protect all citizens equally. Further, the administration of law cannot discriminate based on gender. Therefore, a state statute of limitations which, either facially or by its administration, unreasonably limits the opportunity of the victim to enforce their right to a remedy effectively constitutes state action which denies due process as a remedy for an existing right.

Moreover, acts of sexual violence, and threats of violence for disclosure thereof, are overwhelmingly perpetrated against females (see *United States v. Antonio J. Morrison, ET AL.; and Christy Brzonkala v. Antonio J. Morrison, ET AL.*, 529 U.S. 598; 120 S. Ct. 1740; 146 L. Ed. 2d 658 (2000).) Inclusion of personal injury caused by sexual assault, as indistinguishable from other personal injuries, in a law that limits the time within which a victim may seek due process of law, even when threatened with death, has a disparate impact on females as the most likely victims of sexual assault and constitutes state action that denies equal protection.

Despite the well accepted dogma of due process and equal protection in both state and federal legislative and judicial branches, the Illinois Supreme Court fails to recognize the nuances of sexual assault as distinct from other intentional or unintentional wrongful acts that can create personal injuries. Sexual assault is distinct in that it is so personal that it creates psychological changes in the victims that inhibit their ability to proactively respond in a manner that would preserve their judicial rights (see letter of Lawrence D. Largent, Ph.D. attached hereto as Appendix "C".)

Congress recognized in United States v. Morrison, 529 U.S. 598 that the congressional record shows a pervasive bias in various state justice systems against victims of gender-motivated violence. It is manifest that the very disproportionate number of those victims is female. While many states, including Illinois, have enacted legislation that recognizes the need to protect the rights of children who are the victims of sexual assault, this enlightenment has not yet been recognized for adults by statute in Illinois or in any other state. In fact, every state has a two or three year statute of limitations for personal injury that applies to sexual assault and will benefit from the Court's guidance on this matter.

Because gender based violence disproportionately affects females, disparate impact exists in the statute of limitations that limits the rights of adult females to seek civil recourse for injuries that they receive due to sexual assault, particularly if they are further deterred by threats of further violence or death made by a perpetrator capable of carrying out such threats.

If such limitations were imposed on other vulnerable groups, such as children, wrongdoers would be able to perpetrate acts of rape and violence, and even threaten their victims for disclosure of such acts, with impunity knowing that the child could be persuaded or coerced into acceptance of their condition, as was the case in *Parks v. Kownacki*, 193 Ill. 2d 164. This same state of injustice exists for women, and some men, who are subjected to gender based acts of violence.

Assume the following hypothetical: State X has a two-year statute of limitations for personal injury with (unlike Illinois) no statutory provision limiting the manner in which it applies to minors. A decision of the Supreme Court of State X holds that the statute of limitations applies to a minor no differently than to an adult so that the minor is barred after two years even though still a minor. If a young child is later sexually assaulted and threatened with death if he or she tells anyone, and a lawsuit is filed in federal court after the expiration to two years. It is inconceivable that the federal courts would not hold that the legislative act, as applied by the state court, constitutes state action denying the child due process and denying children, equal protection.

The only differences in Petitioner's case are factual questions concerning the psychological affect of rape and death threats upon the ability of an adult female victim to file suit. Dismissal on a pretrial motion precluded evidence of the facts of this case and of expert testimony

with respect to the effects of such facts, which is why the pretrial motion should have been denied unless resolving all such factual issues in Petitioner's favor, and deciding that no set of facts ex ɜt that could entitle Petitioner to proceed with her cause of action.

B. Illinois Law and Recent Illinois Supreme Court Decisions Contravene This Court's Precedents and must be Corrected to Avoid Further Constitutional and Statutory Encroachments.

Section one of the Fourteenth Amendment requires both due process and equal protection for all United States citizens in the creation and enforcement of laws USCS Const. Amend. 14, §1.

This Court reviewed due process under the Fourteenth Amendment as it applied to the statute of limitations in *Logan v. Zimmerman Brush Co., et al*, 455 U.S. 422; 102 S. Ct. 1148; 71 L. Ed. 2d 265 (1982), ironically heard on appeal from the Illinois Supreme Court. This Court held in that case that while state courts may erect reasonable requirements of statute of limitations in order to trigger the right to adjudication, the Fourteenth Amendment requires an opportunity for a hearing appropriate to the nature of the case. That principle is duly challenged in this case where the same two year statute of limitations for routine injuries is applied equally to sexual acts of gender based violence. Id. at 437.

In regard to the issue of equal protection afforded under the Fourteenth Amendment, this Court held in *United States v. Virginia et al. Virgina, et al. v. United States*, 518 U.S. 515; 116 S. Ct. 2264; 135 L. Ed. 2d 735 (1996) that:

> Neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full

> citizenship stature . . . To meet the burden of justification, a State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives [citations omitted.]

While the Illinois statute of limitations, 735 ILCS 5/13-202, is gender neutral in its language, its enforcement, particularly as applied in Park, does not provide due process and equal protection to those who are harmed by gender-motivated violence. Since females are more likely to be the victims of gender-motivated violence, strict enforcement of sexual assault as indistinguishable from other personal injuries under the two-year statute of limitations adversely affects females disproportionately to males. Moreover, since females are more likely to be subjected to threats of further violence or death if they disclose gender-motivated violence, failure to toll the statute of limitations for such threats adversely affects females disproportionately to males.

The State of Illinois faced a similar misapplication of law enforcement in *Williams v. Illinois*, 399 U.S. 235; 90 S. Ct. 2018; 26 L. Ed. 2d 586 (1970). In that criminal case the Illinois Criminal Code provided that prisoners may be sentenced to work off their fines in prison in excess of the maximum time allowed for sentencing. This Court found that, although the law was facially neutral, that provision in the law resulted in disparate impact toward the indigent and so violated the equal protection rights granted under the Fourteenth Amendment. This Court found that disparate impact of a neutral law may violate the equal protection clause of the fourteenth amendment:

> A law nondiscriminatory on its face may be grossly discriminatory in its operation." Here the Illinois statute as applied to Williams works an invidious

> discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment. *Id. at 242.*

As in the Williams case, the facially neutral Illinois statute of limitations for personal injuries has a disparate impact on rape victims and upon females by not recognizing a unique standard for gender-based violence. The consequence of mechanical enforcement of the two-year limitation for personal injury that includes gender-based violence, or that countenances further threats of violence or even death through removal of estoppel and public policy protection, is that both male and female victims may be denied due process of law and that females will receive significantly less protection than males under the law.

Under the Illinois Code of Civil Procedure, 735 ILCS 5/13-202, a cause of action may be brought for personal injury, including personal injury due to sexual assault, within two years of the time that the cause of action occurred. Illinois courts recognize the discovery rule doctrine to toll the statute of limitations until the victim of a personal injury knows, or should know, that an injury

occurred and was wrongfully caused. (See *Parks v. Kownaski supra.*)

The Illinois Supreme Court in *Golla v. General Motors Corporation,* 657 N.E.2d 894, recognized a difference between injuries that result from a traumatic event and injuries that are latent and manifest themselves later. In the case of injuries resulting from traumatic events, was and is the opinion of the Illinois Supreme Court in that case that the injured party is presumed to have notice of their injury and that the conduct that caused the injury is actionable. Latent injuries that manifest later as a result of the traumatic event do not extend the statutory period to file an action. *id. at 903.*

The Illinois Supreme Court in *Teresa Clay v. Brother Richard Kuhl,* 189 Ill. 2d 603; 727 N.E.2d 217 (2000), determined that this standard of immediate notice, in spite of later manifested injuries, applied to cases of sexual assault as they would to any other personal injury. In that case a woman was sexually assaulted as a child between the ages of nine and sixteen. She did not manifest her injuries until she was thirty two years old. The Illinois Supreme Court held, in dicta, that, ". . . there was no requirement that a plaintiff must know the full extent of her injuries before a suit must be brought under the applicable statute of limitations."

The position taken by the Illinois Supreme Court mechanically applies the two-year statute of limitations in a "one size fits all" doctrine that creates a bar to victims of sexual assault, even if the victims of such assault cannot acknowledge or truly comprehend their injury, or if they cannot rationally make the decision to employ their legal rights, or if threats make them afraid to do so. The psychological and physiological affects of rape differ immensely from any other wrongful act. Acts of sexual violence are more intimate. They dehumanize the victim

and create coping mechanisms that often inhibit the injured party from filing even criminal, much less civil action. The clear facts are, as recognized by Congress in their enactment of 42 USCS § 13981, that females are by far the most likely victims of gender based sexual violence. Therefore, females would also by far be the most likely victims of further violence or death if they disclose such gender based violence.

The issue is further complicated because females are often presumed complicit by courts and are thereby subjected to intense scrutiny to preserve the rights of the accused. The statute of limitations for the felony of rape is substantially longer than for civil litigation. If the victim sues her attacker in civil court before their conviction in criminal court, the presence of the lawsuit creates a presumed motive for the victim to give other than truthful testimony and could weaken the criminal case against the attacker.

II. CERTIORARI IS NECESSARY TO DECIDE WHETHER THE ILLINOIS SUPREME COURT'S INTERPRETATION OF ESTOPPEL AS INAPPLICABLE TO COERSION AND THREATS VIOLATES VITAL PUBLIC POLICY INTEREST AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Appellate Court Opinion Sets a Dangerous Precedent

The Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process or deny any person equal protection of the law. Yet the Illinois Supreme Court holdings fail to apply the doctrine of equitable estoppel or public policy

to toll the statute of limitations in such cases where threats of violence restrain victims from acting on their legal rights.

The application of the statute of limitations in a manner which, under the factual circumstances, effectively denies a person (whether male or female) of due process in pursuing a remedy constitutes state action in violation of due process. Moreover, Congress has recognized the need for special protection against gender-based violence and so, in 1994, enacted the Violence Against Women Act, 42 USCS 13981.

This Court ruled in *United States v. Morrison*, 529 US 598, that the commerce clause does not provide Congress with authority to enact that section's federal civil remedy because it provided civil remedies against private actors rather than against state action. Although the remedies of the act therefore cannot be used directly against private actors, 42 USCS 13981(b) still codifies that, "All persons within the United States shall have the right to be free from crimes of violence motivated by gender."

This Court ended its analysis of Morrison by noting, "If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States." *id. at 627.*

Remedies for such violence exist under Illinois law. However, the Illinois two-year statute of limitations, as construed by decisions of the Illinois Supreme Court and as upheld in this case by the United States Court of Appeals for the Seventh Circuit, constitutes state action in violation of that act, and also of due process and equal protection, and thereby creates an incentive to perpetrators of gender based violence to commit wrongful acts and to use threats and other coercive tactics to escape retribution.

The Illinois Supreme Court in *Parks v. Kownacki*, 193 Ill. 2d 164 ruled that no estoppel argument is available to toll the statute of limitations due to threats of reprisal against the victim of sexual assault. In that case it was alleged that a young girl was repeatedly raped by her priest who enacted physical violence against her and threatened physical harm and excommunication to her and her family if she informed anyone about his sexual violence. Later, an employee of the Diocese told the victim that the church would discipline the priest if she would forgive him. The Illinois Supreme Court held that equitable estoppel did not apply because the elements of equitable estoppel regard only misrepresentation. The Illinois Supreme Court held specifically that threats of retaliation and the fear resulting from those threats do not satisfy a claim for equitable estoppel[1]. The State of Illinois provides a remedy for victims, but if the state limits the remedy in a manner that denies both due process and equal protection, that limitation constitutes unconstitutional state action.

The dissenting opinion in the Parks case demonstrates concern over the statutory termination of the plaintiff's rights in that case:

> Where a defendant uses duress to prevent the plaintiff from filing suit or otherwise enforcing her legal rights, as Kownacki is alleged to have done here, the duress tolls the running of the limitations period. 54 C.J.S. *Limitations of Actions* § 92 (1987). Based on the allegations in Mrs. Parks' complaint, Kownacki's wrongdoing may be imputed to the Diocese and the Parish. Accordingly, the duress applied by Kownacki tolled the time limitations against those defendants

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[1] The public policy argument was never addressed by the United States Court of Appeals for the Seventh Circuit in this case.

as well. The circuit court therefore erred in dismissing counts I through X, and the appellate court was correct in reversing that part of the circuit court's judgment.

In this case the Appellate Court, relying on the Parks case, held that the Illinois Supreme Court has fused the otherwise distinct doctrines of equitable estoppel and equitable tolling. Equitable tolling would act to permit one to sue after the statute of limitations period if, through no fault of their own or lack of diligence, they were unable to sue within the statutory period. The Illinois Supreme Court ruling in Parks, however, only allows the statute of limitations to be tolled based on equitable estoppel wherein a necessary element is the misrepresentation or concealment of a fact relevant to the injury. No tolling of the statute of limitations is otherwise available.

The decision in this case has created an expanded precedent to the Parks case such that any wrongdoer can; through coercion, manipulation and even physical violence, force a potential plaintiff to not file an action during the statutory period and be rewarded by evading the consequences of their wrongful acts.

B. This Case Presents an Excellent Vehicle for Considering the Question Presented.

As previously stated, every state has a statute of limitations period of two or three years, for personal injuries, the broad scope of which includes gender based violence. The question of gender based violence as it relates to the time for adjudication has never been addressed except for the attempt of Congress to statutorily alleviate the quandary. The concern of Congress and the societal concern of women's rights have grown exponentially in recent years.

Resolution by this Court is the only method of relief available to resolve this vital question. While this Court has made clear that federal legislation cannot be used directly against private actors, it has also made clear that it will not let stand state acts that deny due process or discriminate, intentionally or unintentionally, against any particular group.

This case involves a major celebrity who is alleged to have used his vast influence to perpetrate an heinous act against a woman who for years, as a result of the affects of such act itself, compounded by his threats of further violence and death, has been helpless to hold him accountable for those acts. The lower courts have ruled, based on a 12(b)(6) motion to dismiss, that no action is available. This Court's determination to grant certiorari will allow this Court to consider whether such ruling constitutes state action which denies due process and whether gender-based violence, and threats by the perpetrator thereof, can be distinguished as acts primarily against women, and thus constitutes state action which denies due process and equal protection, and thereby provide guidance to the lower courts to distinguish those acts from other wrongful acts of personal injury.

CONCLUSION

For the above reasons, Petitioners pray that this Court grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JACQUE HOLLANDER,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	No. 05 C 0057
	)	
	)	Magistrate Judge Schenkier
	)	
JAMES BROWN and JAMES BROWN ENTERPRISES, INC.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER[1]

Defendants, James Brown ("Brown") and James Brown Enterprises, Inc. ("Brown Enterprises"), have filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (6) doc. # 8). Defendants' motion seeks dismissal of a five-count complaint filed by the plaintiff, Jacque Hollander. Plaintiff asserts claims: (a) against Mr. Brown for

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[1] On March 15,2005, by consent of all the parties and pursuant to 28 U.S.C. § 636(c), the Executive Committee reassigned the case to this Court for all proceedings, including the entry of final judgment (doc. ## 13-15).

false imprisonment (Count I), sexual assault and battery (Count II), and intentional infliction of emotional distress (Count III); (b) against Mr. Brown and Brown Enterprises for negligence (Count IV); and (c) against Brown Enterprises under the doctrine of respondeat superior (Count V). For the reasons that follow, defendants' motion to dismiss is granted.

I.

The purpose of a motion to dismiss under Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide its merits Gibson v. Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). In considering a motion to dismiss, the Court accepts all well-pled allegations as true and draws all reasonable inferences in the light most favorable to the moving party. Henderson v. Sheahan, 196 FJd 839,845 (7th Cir. 1999). In order to survive a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. Lucien v. Preiner, 967 F.2d 1166, 1168 (7th Cir. 1992). Turning to the complaint, the relevant allegations, which we take as true solely for the purposes of this motion, are as follows.

Defendants retained plaintiff to assist with public relations sometime "between the years of 1987 and 1988" (Compl. at 7). In return for plaintiffs public relations services, defendants agreed to aid plaintiff in her aspiration to become a songwriter as part of her compensation (Id.). Sometime in April 1988, plaintiff met with Mr. Brown and Albert Dallas, an attorney representing both defendants, at the corporate offices of Brown Enterprises in Augusta, Georgia (Id. at ~ 10). The purpose of the meeting was for plaintiff to provide paperwork and to discuss her career (Id. at ~ 9). When the meeting ended, Mr. Dallas told plaintiff

to accompany Mr. Brown in his vehicle, so that Mr. Brown could show her a car he was having customized (Id. at 11). While plaintiff was placing belongings in her own car, she observed Mr. Brown exit the Brown Enterprises offices carrying what appeared to be a shotgW1 (Id. at 12). Assuming that the gW1 was for Mr. Brown's protection, plaintiff entered Mr. Brown's vehicle (Id. at 13).

Mr. Brown drove plaintiff to the car dealership, where she toured the premises while Mr. Brown met with the staff (Compl. at 13). After leaving the dealership with plaintiff, Mr. Brown allegedly began to drive recklessly, ignoring plaintiffs pleas that he slow down (Id. at ~ 15). Plaintiff claims she observed Mr. Brown foaming at the mouth, speaking incoherently, acting paranoid, and exhibiting spastic facial movements (Id.). Mr. Brown allegedly threatened plaintiff to remain silent. and then exited the highway onto a deserted property in South Carolina (Id. at 15-16). Plaintiff claims that upon stopping the vehicle, Mr. Brown ordered her into the back seat of the van and told her to remove her clothing (Id. at 17). Plaintiff alleges that when she pleaded with Mr. Brown not to make her do this, he responded by grabbing the shotgun and threatening to harm her if she did not comply (Id.). Over the next several hours, Mr. Brown allegedly raped, beat, and mentally tortured plaintiff (Id. at' 18). Plaintiff alleges that after he later returned her to Brown Enterprises in Augusta, Georgia, Mr. Brown threatened to have plaintiff killed if she told anyone what had happened (Id.).

Plaintiff alleges that some 12 years later, on or about December 27, 2000, she was diagnosed with a condition known as Graves' disease (Compl. at , 19), which is "characterized by hypermetabolism and elevated serum levels of free thyroid hormones." See THE MERCK MANUAL at 86 (7(h ed.). Plaintiff further alleges that sometime in 2003, plaintiff was informed by an unidentified treating physician that the actual and proximate cause of the Graves' disease

was the rape and torture allegedly perpetrated by Mr. Brown in 1988 (Id. at ¶ 120).[2]

II.

Defendants move to dismiss the complaint on the ground that all of plaintiffs claims, which were first asserted in the complaint filed on January 5, 2005, are barred by Illinois' two-year statute of limitations applicable to tort claims for personal injury. 735 ILCS 5113-202. Statutes of limitation are governed by the law of the forum state. Thomas v. Guardsmark, Inc., 381 F .3d 70 I, 707 (7th Cir. 2004) ("[a] federal court sitting in diversity must follow the statute of limitations that he state in which it is sitting would use"); see also Cox v. Kaufman, 571 N.E.2d 1011, 1015 (1 st Dist. 1991). Plaintiff concedes this point (Pl.'s Mem. at 7, ~ 21). This Court, exercising diversity jurisdiction in this case, sits in Illinois and will thus apply the Illinois statute of limitations to all of plaintiff s claims, since they all arise under tort law and allege personal injury.[3]

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[2] In her brief on the motion to dismiss, plaintiff elaborates that she first obtained this information "after January 5,2003" (PI. 's Mem. at 6, 19).

[3] Plaintiff does not argue that a choice of law dispute exists with respect to the statute of limitations question (PI. 's Mem at 7). However, even if we were to apply the statute oflimitations of Georgia (where Brown Enterprises is incorporated (Compl. at 3, or South Carolina (where Mr. Brown resides and where the alleged attack in 1988 occurred (Id. ,~ 2, J 6»), it would not affect the outcome of this motion. Like I11inois, Georgia has a two~year limitations period for personal injuries (including those caused by negligence), Ga. Code Ann., §§ 9-3~33 (West 2005).

South Carolina, on the other hand, has a three~year statute of limitations for intentional torts that include assault and battery,

(continued...)

Section 13-202 states, in relevant part, that "[a]ctions for damages for an inj ury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, . . . shall be commenced within two 2 years next after the cause of action accrued . . . . " 735 ILCS 5/13-202. Under Illinois law, "a cause of action accrues at the time [a plaintiffs] interest is invaded . . . " Hyon Waste Mgmt. Servs. v. City of Chicago, 574 N.E.2d 129, 132 (lst Dist. 1991). This general rule is tempered by an additional requirement, known as the "discovery rule"; the plaintiff must "know[] or reasonably should know that he has been injured and that his injury was wrongfully caused" before the statute will begin to run. Golla v. Gen. Motors Corp., 657 N.E.2d 894, 898 (Ill. 1995).

In applying the discovery rule, Illinois courts recognize a difference between the discovery that one has been injured, and the realization of the full extent of the injury. Thus, "the mere fact that the extent of [one's] damages is not immediately ascertainable does not postpone the accrual of a plaintiffs claim." Hyon, 574 N.E.2d at 132. Rather, when a person sustains a personal injury as a result of a sudden, traumatic event, the statute of limitations begins to run at the time of the event. Golla, 657 N.E.2d at 899-900. "The rationale supporting this rule is that the nature and

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[3] (...continued)
but not false imprisonment, S.C. Code AM. § 15-3-530 (West 2005). False imprisonment is governed by a two-year statute of limitations under S.C. Code Ann. § 15-3-550 (West 2005). It is not clear from the defendant's citation what statute governs the limitations period for negligence. But, since the Court rmds that Illinois law applies, further inquiry is unnecessary. And, given the length of time between the alleged events in 1988 and the filing of this lawsuit in 2005, whether a two-year or three-year limitations period would apply is immaterial to the outcome of this motion

circumstances surrounding the traumatic event are such that the injured party is thereby put on notice that actionable conduct might be involved." Id. at 899.

Notice, therefore, is a term that embraces a reasonable person standard: if a reasonable person knew or should have known he or she was injured by an act or event, then the statute begins to run from that moment. Wells v. Travis, 672 N.E.3d 789, 793 (2d Dist. 1996). The knowledge need not be actual as long as the injured person possesses sufficient information concerning the injury and its cause to induce a reasonable person to make further inquiries. Swann & Weiskopf, LId v. Meed Assoc., Inc., 711 N.E.2d 395, 399 (1st Dist. 1995). "To determine when a plaintiff reasonably should have discovered that an injury was caused by defendant's wrongful conduct, courts look to the nature of the injury itself; the more obvious the injury, the more easily a plaintiff should be able to determine its cause." Hoffman v. Orthopedic Sys., Inc., 765 N,E.2d 116, 121 (1st Dist. 2002).

III.

Defendants argue that plaintiffs claims are barred by Illinois' two-year statute of limitations, as the complaint discloses that the defendants' conduct occurred in Apri11988 and this suit was not filed until January 2005, nearly 17 years later. Plaintiff, for her part, contends that her claims are saved by the discovery rule. Specifically, plaintiff contends that her sole injury from the 1988 events is Graves' disease, and she only discovered the link between the 1988 events and this disease some time after January 5,2003, when an unidentified treating physician linked them - not in 2000, when she was diagnosed with the disease (Pl.'s Mem. at 3, ¶¶ 5, 7, 11). Alternatively, plaintiff argues that the two-year statute of limitations should be tolled because, as a result of Mr. Brown's alleged threats,

she "had a very reasonable belief that she would have suffered considerable harm if she filed an action within the statute of limitations period" (p1.'s Mem. at 5, ¶¶ 12-13).

Because the statute of limitations is an affirmative defense, dismissal under Rule 12(b)(6) is only appropriate if the allegations in the complaint show that a cause of action is time- barred. Clark v. City of Braidwood, 318 F.3d 764,767 (7lh Cir. 2003). Thus, the question before us is whether plaintiffs complaint contains allegations showing that her claims for false imprisonment (Count I), sexual assault and battery (Count II), intentional infliction of emotional distress (Count III), negligence (Count IV) and respondeat superior (Count V) are barred by the Illinois two-year statute of limitations. For the reasons that follow, we conclude that it does.

A.

We begin with plaintiff s argument based on the discovery rule. A traumatic event, such as the one alleged by plaintiff here, falls within the "obvious injury" category and, in our view, requires us to count the two-year period beginning from April 1988. The allegations in the complaint reveal that as to each of her claims, plaintiff had notice that her "interest[s] [were] invaded," Hyon, 574 N.E.2d at 132, as of April 1998, when she experienced the alleged "sudden, traumatic event[s]." Golla, 657 N.E.2d at 899-900. To illustrate this point, we address the elements and allegations of each claim.

Count I asserts a claim of false imprisonment against Mr. Brown. To state a claim for false imprisonment under

Illinois law,[4] a plaintiff must establish an unreasonable restraint of liberty against her will, caused by the defendant. Carey v. K-Way, Inc.,728 N.E.2d 743, 746 (lst Dist. 2000). Plaintiff alleges that in April 1998, she was unreasonably restrained against her will at the time when she asked Mr. Brown to allow her to leave the vehicle, and he unlawfully refused to do so (Compl. at 23-26). Thus, plaintiff's cause of action for false imprisonment accrued in April 1988, because it is at that time that she knew she was restrained against her will.

Count II asserts a claim for sexual assault and battery against Mr. Brown. In Illinois, a sexual assault consists of an act of sexual penetration by the use or threat of force or violence. People v. Casiano, 571 N.E.2d 742, 748 (lst Dist. 1991). The plaintiff alleges that she was the victim of penetration achieved by force by alleging that she was threatened with a shotgun, ordered to take off her clothes, and forced to engage in sexual intercourse and other sex acts (CampI. at 17-18,30- 31). These allegations are sufficient to establish that plaintiff had notice of her alleged sexual assault claim in April 1988, and that her sexual assault claim thus accrued in April 1988.

The plaintiff s allegations of battery in Count II also show that she had notice of that claim in April 1988. Under Illinois law, the elements of battery include an intentional

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[4] We apply Illinois law with respect to the elements of the plaintiff's false imprisonment, sexual assault and battery, and intentional infliction of emotional distress claims, as the parties do not suggest any other law should be applied in thsi diversitya ction. They only choice of law issues raised involve the negligence (Count IV) and respondeat superior (Count V) claims, which we address at page 9, infra.

act by the defendant which results in an "offensive contact with the plaintiffs person." McNeil v. Carter, 742 N.E.2d 1277, 1281 (3d Dist. 2001). Plaintiff alleges that offensive contact by Mr. Brown to her person in 1988, when Mr. Brown allegedly struck her, pulled her hair, slammed her against his van (Compl. at ~ 30) - and, indeed, allegedly raped her (Id. at ~ 18). These allegations plainly establish that plaintiff had notice of her battery claim in April 1988, and that it accrued as of that date.

Count III asserts a claim for intentional infliction of emotional distress ("IIED") against Mr. Brown. In Illinois, to state a claim for IIED, a plaintiff must allege that the defendant's conduct was extreme and outrageous, that the defendant intended to cause to knew that the conduct was highly likely to cause extreme emotional distress, and that the defendant's conduct did in fact cause such distress. Thomas v. Fuerst, 803 N.E.2d 619, 625 (1st Dist. 2004). The conduct plaintiff ascribes to Mr. Brown — namely, trapping her in a speeding van, threatening to kill her, physically and sexually assualting her, and forcibly raping her. (PI's Compl. ¶¶ 23-25, 30) — comfortably falls within any reasonable definition of "extreme and outrageous". Plaintiff further alleges that Mr. Brown knew or should have known that this alleged conduct would cause plaintiff "significant trauma" (Compl. at ¶¶ 34-35). Based on these allegations, any reasonable person would have had notice of the wrongful invasion of interests in April 1988, and thus the IIED cause of action accrued as of that date.

Count IV asserts negligence claims against both defendants. To state a claim for negligence under Illinois law, a plaintiff must allege the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury caused by that breach. Thompson v. County of cook,

608 N.E.2d 290, 293 (Ill. 1993). Here, plaintiff allege that when was a passenger in Mr. Brown's vehicle in April 1988, Mr. Brown owed her a duty "to not partake in a substance that would so impair his ability that it would place [p]laintiff in jeopardy (Compl. at ¶ 39). She further alleges that Mr. Brown breached that duty by allegedly taking some such substance (Id. at ¶ 38). Thus plaintiff alleges facts that show she had notice of this claim more than 16 years ago, and so her negligence clam against Mr. Brown therefore accrued as of April 1988.

As for Brown Enterprises, plaintiff alleges that it had a duty to her to "mitigate situation" by preventing Mr. Brown from taking plaintiff in ahis vehicle, or "to warn [p]laintiff of the risks" of Mr. Brown's alleged behavior and drug usage (Compi. at ~ 42). Again, plaintiff alleges that Brown Enterprises owed her a duty in April 1988, when she was a passenger in Mr. Brown's vehicle. Plaintiff was on notice in Apri11988 that Brown Enterprises had breached this alleged duty, and thus her claim against Brown Enterprises accrued at that time.

Finally, in Count V, plaintiff seeks to hold Brown Enterprises liable under the common law theory of respondeat superior, premised upon the negligence of Mr. Brown. A claim under the theory of respondeat superior is subject to the statue of limitations applicable to the underlying theory of liability against the employee, here negligence, which is two years. See Medina v. Tay/or, 542 N.E.2d 33, 34-35 (1 sl dist. 1989). Because the negligence claim does not survive the two-year statute of limitations, the respondeat superior claim cannot survive either, since there is no negligent act by the employee, Mr. Brown, upon which to base the claim.[5]

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[5] A choice oflaw issue has been raised with respect to the negligence and respondeat superior claims. A federal court (continued...)

We have considered plaintiff's attempt to invoke the discovery rule to defer the start of the statute oflimitations until some time after January 5, 2003, when she allegedly was first told that the Graves' disease (which first surfaced in 2000) was caused by her alleged encounter with Mr. Brown in April 1988. Plaintiff claims that prior to January 2003, no reasonable person, in her shoes, would have known that the Graves' disease was linked to the alleged 1988 events, because no injury prior to that time would have provided that awareness (pl. 's Mem. at 4, ~ 11). Notwithstanding plaintiff's attempt at artful pleading, we reject plaintiff's discovery rule argument based on a straightforward application of the well-settled principle under Illinois law that what triggers the onset of the statute of

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[5] (...continued)
exercising diversity jurisdiction applies the choice of law rules of the state in which it sits - here, Illinois. In Illinois, the threshold determination in a choice of law dispute is whether a "true conflict" exists. Schoeberle v, u.s., Nos. 99 C 0352,99 C 2599,99 C 2292, 2000 WL 1868130, at 6* (N.D. Ill., Dec. 18,2000). A true conflict does not exist unless "there is an actual conflict in the substantive law such that the case would have a different outcome depending on which law is applied." [d. For purposes of the negligence claim in Count IV, the laws of Georgia and South Carolina both have the same substantive elements as Illinois. See, e.g .. Bajwa v. Metro Life Ins. Co., 804 N.E.2d 519,526 (111. 2004) ("To recover in a negligence action, a plaintiff must allege facts from which a court will find a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach"); compare Johnson v. Am. Nal. Red Cross, 578 S.E.2d 106, 108 (Ga. 2003) (elements of negligence are: duty, breach of duty, causation, and damages); Whaley v. CSXTransp .• Inc., 609 S.E.2d 286,298 (S.C. 2005) (common law elements of negligence are duty, breach, causation and damages). There being no true conflict, no choice oflaw issue is present. And, without a negligence claim, there can be no respondeat superior claim.

limitations is the alleged invasion of plaintiffs legally cognizable interest in 1988. Illinois law is unequivocal in that "the mere fact that the extent of . . . damages is not immediately ascertainable does not postpone the accrual of a plaintiffs claim." Hyon, 574 N.E.2d at 132. Thus, the fact that certain effects of that alleged invasion may not have been linked to that invasion of interest for some 15 years does not provide us with a sound basis for application of the discovery rule.

Rather, a finding that plaintiff's claims are barred here is consistent with the philosophy underlying the discovery rule. Statutes of limitations exist to prevent the bringing of stale claims.

> Statues of limitation . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has ajust claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Telegraphers v. R.R. Express Agency, Inc., 321 U.S. 342, 348-49 (1944); see also Hyon, 574 N .E.2d at 132. Liberal application of the discovery rule exception to a case like this would undennine the limitations period and create uncertainty and doubt in the place of predictability and inality. Sepmeyer v. Holman, 642 N.E.2d 1242, 1245 (Ill. 1994). Unlike certain toxic tort cases, plaintiff's alleged injury here was not inherently unknowable at the time of injury. Urie v. Thompson, 337 U.S. 163, 169 (1949). See also Nolan v. Johns-Manville Asbestos, 421 N.E.2d 864, 867 (Ill. 1981); Hill v. Pedapti, 759 N.E.2d 1015, 1018 (2d Dist. 2001). Rather, plaintiff simply did not know the full extent

of her alleged injuries until after the statute expired. That is precisely the type of case to which the discovery rule does not apply.

B.

Alternatively, plaintiff argues that the commencement of the limitations period should be tolled, because that she feared retaliation from Mr. Brown based on his threat to have her killed if she told anyone of the alleged 1988 attack (PI.'s Mem at 5, "12-13). The Court is not persuaded that this allegation serves as a basis for tolling the statute of limitations. Plaintiff concedes that there is no precedent establishing tolling on this basis, and this Court will not create precedent for such an argument. To toll the statute on such a basis for any amount of time, let alone for nearly 17 years, would seriously undermine the purpose of the statute and open the classic "Pandora's Box" of stale claims. Virtually any claimant who missed the limitations period could allege a threat of retaliation to defeat the statute. We find no basis for that result in Illinois law.

CONCLUSION

For the reasons given above, defendants' motion to dismiss (doc. # 8) is granted. This case is terminated, and a final judgment should be entered by the Clerk of the Court pursuant to Fed.R.Civ.P.54.[6]
Enter:

Sidney I. Schenkier, United States Majistrate
Dated: June 28, 2005

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[6] The defendant also argues that the Court should strike paragraphs 7, 18 and 19 of plaintiff's response, since it seeks to correct pleading errors in the complaint (Defs.' Reply Mem. at 4). The Court need not decide this issue given the rulings above..

United States District Court
Northern District of Illinois
Eastern Division

Hollander
v.
Brown

Judgement in a Civil Case
Case Number: 05 C 57

■ Decision by Court. This action came to hearing before the court. The issues have been heard and decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's motion to dismiss is granted, and a Rule 54 final judgment is entered.

Michael W.Doggins, Clerk of Court
/s/ Merwin Myvett, Deputy Clerk

Docket Entry Text
ENTER MEMORANDUM OPINION AND ORDER (attached). for the reasons stated in the Court's Memorandum Opinion and Order, defendants' motion to dismiss (doc. #8) is GRANTED. the status for conference set for 06/30/05 is stricken. The case is terminated, and a Rule 54 final judgment is entered.

In the
United States Court of Appeals
For the Seventh Circuit

No. 05-3176

JACQUE HOLLANDER,

Plaintiff-Appellant,

v.

JAMES BROWN and BROWN ENTERPRISES, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 57—**Sidney I. Schenkier**, *Magistrate Judge.*

ARGUED FEBRUARY 23, 2006—DECIDED AUGUST 9, 2006

Before EASTERBROOK, RIPPLE and WOOD, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Jacque Hollander appeals the dismissal, on statute of limitations grounds, of a personal injury action that she brought against James Brown and Brown Enterprises for an alleged 1988 incident of sexual assault. Ms. Hollander submits that the limitations period should not have begun until 2003, when she was informed by her physicians that the 1988 sexual assault had caused her to suffer from a condition known as Graves' disease. For the reasons set forth in this opinion, we affirm the judg-

ment of the district court.

I

BACKGROUND

A. Facts

The complaint alleges the following facts; we must accept them as true in reviewing a Rule 12(b)(6) dismissal. *See Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 539 (7th Cir. 2005).

In the late 1980s, James Brown Enterprises, Inc. ("Brown Enterprises"), hired the plaintiff, Ms. Hollander, as a public relations assistant. Some time in April 1988, there was a meeting between Mr. Brown and Ms. Hollander at the offices of Brown Enterprises in Augusta, Georgia. As the meeting was wrapping up, Mr. Brown invited Ms. Hollander to take a ride with him to see a car that he was having customized. Ms. Hollander agreed, and the two drove to a nearby car dealership.

On the way back from the dealership, Mr. Brown allegedly began driving erratically and exited the highway onto a deserted piece of land in South Carolina. There, according to Ms. Hollander's complaint, he proceeded to beat, rape and psychologically torture her over the course of several hours. Mr. Brown then returned Ms. Hollander to Augusta and threatened to have her killed if she told anyone what had happened.

Ms. Hollander alleges that, some twelve years later, she was diagnosed with a condition known as Graves' disease, an auto-immune deficiency that affects the thyroid gland and causes low energy, depression and mood swings. Three years later, in 2003, Ms. Hollander was informed by a physician that the cause of her Graves' disease was the rape and torture allegedly perpetrated by Mr. Brown in 1988.

B. District Court Proceedings

On January 5, 2005, invoking the district court's diversity jurisdiction, Ms. Hollander brought this action against Mr. Brown and Brown Enterprises in the Northern District of Illinois. Counts I through III asserted claims against Mr. Brown for false imprisonment, intentional infliction of emotional distress, sexual assault and battery. Count IV alleged negligence against both Mr. Brown and Brown Enterprises. Count V claimed that Brown Enterprises was vicariously liable for Mr. Brown's actions under the doctrine of respondeat superior.

On February 16, 2005, Mr. Brown and Brown Enterprises joined in filing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion, holding that Ms. Hollander's action was barred by the two-year statute of limitations that governs tort claims for personal injury in Illinois.[7] *See* 735 ILCS 5/13-202. Under that statute, the two-year limitations period begins when the "cause of action accrued." *Id.* In determining the accrual date of Ms. Hollander's claim, the district court began by noting two basic principles of Illinois law: (1) that

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[7] It is, of course, "irregular" to dismiss a claim as untimely under Rule 12(b)(6). *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004). Under Federal Rule of Civil Procedure 8, a complaint need not anticipate or overcome affirmative defenses such as the statute of limitations. *See Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004). As a result, a federal complaint does not fail to state a claim simply because it omits facts that would defeat a statute of limitations defense. However, as the district court observed, dismissal under Rule 12(b)(6) on the basis of a limitations defense may be appropriate when the plaintiff effectively pleads herself out of court by alleging facts that are sufficient to establish the defense. *See United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005). The district court concluded that this was such a case.

a cause of action accrues at the time a plaintiff's interests are invaded; and (2) that, under the "discovery rule," a plaintiff also must know, or be on reasonable notice, that her interests have been invaded before the limitations period begins to run. R.21 at 4.

In rejecting Ms. Hollander's claim that the discovery rule should extend the statute of limitations in this case, the court distinguished between the late realization of one's injury from the late realization of the *extent* of that injury. In the district court's view, Ms. Hollander's allegations described a sudden, traumatic injury that was, or should have been, obvious to her at the moment it occurred. The court therefore ruled that her discovery of the full extent of her injury, some fifteen years later, did not provide a basis for extending the statute of limitations.

The court also rejected Ms. Hollander's claim that the statute of limitations should have been tolled because she feared retaliation from Mr. Brown.

II

DISCUSSION

A.

We first address whether the district court erred in concluding that Ms. Hollander's action was time-barred. Under the familiar rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), we apply Illinois[8] substantive law to resolve this question. *See Guaranty Trust v. York*, 326 U.S. 99, 110 (1945) (holding that statutes of limitations are considered substantive matters for purposes of the *Erie* doctrine). Further, as a consequence of our obligation under

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[8] The parties do not contend in this appeal that any other state's law should govern the dispute.

Erie, we shall not anticipate changes to state law in the absence of concrete evidence that the state court would adopt that position today. *See Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996). Indeed, we have warned litigants that those who seek to base their claims on an innovation in state law would be well-advised to file their claims in state court. *See id.*; *Shaw v. Republic Drill Corp.*, 810 F.2d 149, 150 (7th Cir. 1987) (per curiam).

Under the Illinois Code of Civil Procedure, the statute of limitations for personal injury claims requires that an action be commenced within two years of the date on which the cause of action accrued. *See* 735 ILCS 5/13-202. As a general rule, a cause of action for personal injury accrues when the plaintiff suffers the injury. To alleviate the harshness that would flow from literal application of this general principle, Illinois courts also recognize a "discovery rule." *See, e.g., Parks v. Kownacki*, 737 N.E.2d 287, 294 (Ill. 2000). The effect of the discovery rule "is to postpone the commencement of the relevant statute of limitations until the injured plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused." *Golla v. Gen. Motors Corp.*, 657 N.E.2d 894, 898 (Ill. 1995).

In determining when a plaintiff reasonably should have discovered her injury, Illinois courts distinguish between injuries caused by sudden, traumatic events and those that have a late or "insidious" onset. *See Hauk v. Reyes*, 616 N.E.2d 358, 360 (Ill. App. Ct. 1993). For limitations purposes, a "sudden, traumatic event" is one that, because of its force or violence, permits the law to presume that the event immediately placed the plaintiff on notice of her injury and a right of action. *See Golla*, 657 N.E.2d at 899. When a plaintiff suffers this type of injury, her cause of action accrues on the date of the traumatic event, and the limitations period does not begin anew simply because a latent condition later may arise from the same occurrence.

See id. The rationale is that "the nature and circumstances surrounding the traumatic event are such that the injured party is thereby put on notice that actionable conduct might be involved." *Id.*

In insidious onset cases, by contrast, the nature of the event does not permit the plaintiff to learn of her injury, or of the causal link between the defendant's conduct and her injury, until some time after the event. For example, a plaintiff who has been exposed unknowingly to asbestos may not discover until years later that she now has cancer and that the exposure was its cause. *See, e.g., Nolan v. Johns-Manville Asbestos*, 421 N.E.2d 864, 866 (Ill. 1981). In such situations, the discovery rule starts the statute of limitations from the date when the plaintiff discovers, or reasonably could discover, both her injury and the causal connection between her injury and the tortious conduct. *See id.* at 868.

Ms. Hollander submits that her injuries from the 1988 sexual battery were not sudden, but rather "slow and cumulative." Appellant's Br. at 10. The thrust of Ms. Hollander's argument is that the psychological trauma of the rape made discovery of her full injury a slow and lengthy process. Notably, Ms. Hollander does not contend either that she repressed memories of her encounter with Mr. Brown or that she was unaware of the fact that she had been sexually assaulted until she was diagnosed with Graves' disease. Additionally, Ms. Hollander does not appear to be arguing that she ever was unaware of the false imprisonment and intentional infliction of emotional distress that she allegedly suffered at the hands of Mr. Brown.

It may well be that Ms. Hollander, like many victims of traumatic injury, only gradually came to understand the full extent of the injuries that the rape caused. However, Illinois, whose law we are obliged to apply under the *Erie*

doctrine, *see Erie R.R. Co.*, 304 U.S. at 78, has made it clear that this circumstance does not justify the application of the discovery rule. In *Clay v. Kuhl*, 727 N.E.2d 217, 221 (Ill. 2000), the Supreme Court of Illinois was asked to apply the discovery rule and save an otherwise time-barred claim brought by a woman who had been abused sexually as a child. The plaintiff had alleged that the abuse began when she was nine years old and continued until she was fifteen or sixteen. She reached the age of majority in 1982, but did not bring suit until 1996, when she was nearly thirty-two years old. In urging the court to delay the running of the limitations period, she contended that her injuries were latent and did not manifest themselves fully until years after the abuse had occurred. The court rejected this argument and held that "[t]here is no requirement that a plaintiff must know the full extent of his or her injuries before suit must be brought under the applicable statute of limitations." *Id.* at 222.

In the case before us, the allegations of the complaint make clear that Ms. Hollander knew she had suffered at least some injuries at the time of the incident in 1988. For instance, she alleged that she did not consent to the sexual intercourse with Mr. Brown, *see* R.1 at 6, and that she was aware at the time of the incident that she was falsely imprisoned, *see id.* at 5. Because Illinois law presumes a resulting injury from unwanted touching and unlawful restraint, *see Doe By & Through Doe v. Montessori Sch. of Lake Forest*, 678 N.E.2d 1082, 1089 (Ill. App. Ct. 1997), these allegations make clear that she could have filed suit within the limitations period. Indeed, Ms. Hollander does not contend that those immediate injuries were not actionable, only that the development of the full injury occurred slowly. In the words of the Supreme Court of Illinois, she is "not a plaintiff who failed to discover *any* injury, but a plaintiff who failed to discover the full extent of her injuries before the statute of limitations expired." *Golla*, 657 N.E.2d

at 901 (emphasis in original). This type of plaintiff cannot benefit from the Illinois discovery rule.

B.

In the alternative, Ms. Hollander asserts that Illinois' doctrine of equitable estoppel should bar Mr. Brown from taking advantage of her delay in filing suit. She explains that she postponed her action for fear of retaliation by Mr. Brown who, she alleges, threatened to kill her if she told anyone of the incident.

Like the statute of limitations itself, rules that are an "integral part of the statute of limitations," such as tolling and equitable estoppel, are treated as substantive for purposes of the *Erie* doctrine. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-53 (1980); *Wade v. Danek Med., Inc.*, 182 F.3d 281, 289 (4th Cir. 1999) (holding that "in any case in which a state statute of limitations applies . . . the state's accompanying rule regarding equitable tolling should also apply"). Thus, in addressing Ms. Hollander's equitable estoppel contention, we look to Illinois law for the applicable rule of decision. *See, e.g., Singletary v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 9 F.3d 1236, 1241 (7th Cir. 1993) (applying state principles of equitable estoppel in a diversity action).

In Illinois, the doctrine of equitable estoppel suspends the running of the statute of limitations during any period in which the defendant took certain active steps to prevent the plaintiff from suing.[9] The Illinois courts apply this doctrine

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[9] The Illinois cases appear, at times, to use "equitable estoppel" interchangeably with the related principle of equitable tolling. *See Smith v. City of Chicago Heights*, 951 F.2d 834, 839 n.5 (7th Cir. 1992) (recognizing the overlap in Illinois law). The cases of this

(continued...)

most typically in situations where the defendant has "lulled" the plaintiff into delaying suit, either by promising not to plead a limitations defense or by concealing evidence that the plaintiff needed to determine the existence of her claim. *See, e.g., Swann & Weiskopf, Ltd. v. Meed Assocs., Inc.*, 711 N.E.2d 395, 401 (Ill. App. Ct. 1999); *Beynon Bldg. Corp. v. Nat'l Guardian Life Ins. Co.*, 455 N.E.2d 246, 252 (Ill. App. Ct. 1983) ("Although there is ordinarily no duty to apprise an adversary of his rights, one cannot justly or equitably lull his adversary into a false sense of security, causing him to subject his claim to the bar of the statute, and then plead the very delay caused by his course of conduct."). Some Illinois cases also appear to recognize equitable estoppel in a broader sense as a doctrine that "prevents a party from taking advantage of his own wrongdoing." *Neaterour v. Holt*, 544 N.E.2d 846, 851-52 (Ill. 1989). As one Illinois appellate court has stated: "The test is whether, considering all the circumstances of the case, conscience and honest dealing require that the defendant be estopped." *Franke v. Geyer*, 568 N.E.2d 931, 934 (Ill. App. Ct. 1991).

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[9] (...continued)
court have distinguished equitable tolling as a rule that "permits a plaintiff to sue after the statute of limitations has expired if through no fault or lack of diligence on his part he was unable to sue before, even though the defendant took no active steps to prevent him from suing." *Singletary v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 9 F.3d 1236, 1241 (7th Cir. 1993). The Supreme Court of Illinois, by contrast, defines equitable tolling as a rule that, like equitable estoppel, works to suspend the limitations period when "the defendant has actively misled the plaintiff, or if the plaintiff has been prevented from asserting his or her rights in some extraordinary way." *Clay v. Kuhl*, 727 N.E.2d 217, 221 (Ill. 2000).

Most recently, however, the Supreme Court of Illinois has indicated that equitable estoppel is available only when the defendant has used misrepresentations or concealment—rather than threats of reprisal—to prevent the plaintiff from suing. In *Parks v. Kownacki*, 737 N.E.2d 287 (Ill. 2000), a former parishioner brought an action claiming that a parish priest had sexually abused her when she was a minor. She did not file her complaint until twenty-two years after she had reached the age of majority, and the defendants pleaded the statute of limitations as a defense. In response, the plaintiff contended that, because the priest had threatened her and her family with violent retribution if she were to sue, equitable estoppel should preclude the defendants from invoking the statute of limitations. Rejecting this contention, the court held that the "[p]laintiff clearly has not pleaded the elements of equitable estoppel." *Id.* at 296. Continuing, the court reasoned:

> She does not allege that any defendant misrepresented or concealed any material fact. She alleges only that defendants asked plaintiff to forgive them and to refrain from suing them. In fact, at oral argument plaintiff admitted that she could not demonstrate a misrepresentation or concealment. Without the misrepresentation or concealment of a material fact, equitable estoppel does not apply.

Id.

The statements of the Supreme Court of Illinois in *Parks* control this case. We express no view, of course, on whether *Parks* announced the correct approach or on whether it applied the doctrine of equitable estoppel correctly to the facts before it. It suffices that Ms. Hollander's theory of equitable estoppel is materially identical to the one asserted by the plaintiff in *Parks*. Like the *Parks* plaintiff, Ms. Hollander claims that a threat of violence, rather than a

misrepresentation, prevented her from filing suit. As Ms. Hollander concedes in her appellate brief, this claim does not conform to the equitable estoppel paradigm established by the Illinois case law. She submits, nevertheless, that in resolving her motion to dismiss we must assume that Mr. Brown was lying when he threatened to kill her, and that his statement therefore was technically a misrepresentation. The court in *Parks* was unwilling to make that assumption. Consistent with our obligations under *Erie*, neither may we.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Lawrence D. Largent, Ph.D.
86 Ridgewood Road
Jefferson, Georgia 30549

10/04/06

To Whom It May Concern:

Ms. Jacque Hollander has asked me to provide the following information to you regarding her and her condition as a victim of a violent rape. I worked with her as her psychologist for a number of years and I have now retired. Specifically, she requested that as a psychologist with experience as a law enforcement officer including experience as a consultant to the mental health ward in a state prison, I provide some psychological rationale as to why women who are raped often do not report it and/or why it often takes years, in some cases, before they are able to do so. I am happy to provide this information in the hopes that it may be of some value to the court in its decision making process.

In my professional opinion, there are at least three important broad factors which play an important factor in the low incidence of reporting by rape victims. This is an important problem as most estimates suggest that 80-90% of forcible rapes are probably not reported to authorities. It appears that rape is most likely one of the most frequently committed violent crimes in our country. Among experts in this area, rape is seen not as just a sexual gratification act but rather is considered to be more an act of terrorism. The fact that such a low reporting rate exists for this extremely violent crime is certainly worthy of serious consideration as it does not hold true for women who are victims of other

type crimes or of women who suffer an accidental injury.

The first and second factor to be discussed applies to most rape victims. The last factor discussed applies to a smaller percentage of the rape victims. However, its effect when present is extremely destructive to the victim's ability to productively cope with their life.

The first contributing factor to the reason many women do not report the rape or bring civil suit in a timely fashion is that of the rape induced effects of Post Traumatic Stress Disorder (PTSD) along with other forms of psychological distress. The second factor is the perceived existence of a bias against the victim by the legal system and the third factor is the existence of any significant power disparity between the perpetrator and the victim.

Of course, there are males who are victims of rape and these factors certainly apply to them. However, the majority of victims are females and so the female reference will be used in this discussion.

With regard to the first factor, rape victims typically experience severe traumatizing experiences. The rape induced effects of PTSD are well known and will be not be discussed extensively herein. In brief, PTSD is a specific serious long term anxiety disorder that develops due to exposure to extreme emotional trauma. Three symptom clusters characterize the disorder, all of which represent direct or indirect effects of memory processes: persistent re-experiencing of the traumatic event; persistent symptoms of increased autonomic arousal; and persistent avoidance of stimuli associated with the trauma, which may

even include amnesia for an important aspect of the traumatic event. Thus, rape is a very traumatic event which can produce a wide range of difficulties in psychological functioning. For example, the person who was raped may or may not be able to even admit that she was actually raped, or she may seek medical attention for a different complaint. Emotional reactions differ greatly and may include: shame, confusion, social withdrawal, tearfulness, nervousness or seemingly inappropriate laughter, numbness, hostility, and great fear. It can take a victim a long time to start to recover from these problems. Further, friends and associates of the rape victim often complicate the healing process as they often tend to send the unspoken but clear message that, we really do not want to hear about what happened to you. This message is typically followed by the advice to, move on with your life.

Second, a further reason for the disproportionately low rates of reporting of rape may be the perception of the victim that even though her case may be brought to the courts that there will be system obstacles and discrimination in the form of unreasonable evidentiary requirements. Rape victims typically experience a strong sense of shame and humiliation as well as the feeling that people see them as being at least partly at fault. Thus, the doubting by the legal process of the rape victim's uncorroborated testimony, the detailed scrutiny of their sexual history along with the focus on the victim's level of resistance tends to lead them to feel that they are the ones actually on trial as opposed to the person who raped them. As a part of this process, the victim is at times accused of having ulterior motives and sometimes subjected to degrading questions with often pornographic implications.

Thus, it appears that these first two factors are of critical

importance in the huge number of rape victims who fail to file charges against their attacker. They also contribute to the large number of victims who are unable to regain the psychological strength and resources to bring charges or to file suit before the statute of limitations expires.

With regard to this recovery process, it should be noted that, depression and social adjustment often improve within several months following the trauma, but frequently the recovery takes much longer. The reality is that symptoms such as fear for personal safety, anxiety, reliving of the trauma, sleep disturbances, nightmares and/or avoidance of the stimuli reminiscent of the assault, may persist in many victims for years or until they die.

Finally, there is another factor which applies to a smaller percentage of rape victims and which is of major importance. Unfortunately, it frequently goes unmentioned. This factor is that of the power disparity between the victim and the rapist. By power disparity, I do not mean simply who is physically larger and/or stronger.

The problem here is the question of what actually happens when the victim and the offender go on living and interacting in the same community or society when the perpetrator is significantly wealthier, more socially, and politically powerful than the victim. This question is particularly complicated because rape is an offense most often committed mostly by people who are well known to the victims. The offenders may be employers, husbands, lovers, fathers, friends, neighbors, and/or other people who are often admired and respected members of their communities. Sometimes they are even internationally famous and idolized by other people.

The power of this factor is such that women who are raped by one or more of these powerful men end up experiencing that the usual procedures of criminal and civil law are not effectively set up to provide a remedy for crimes by such perpetrators.

These victims who are raped by powerful men tend to perceive, for example, that our legal system seems to be conducted primarily as an adversarial contest between two people in civil cases. However, it often appears to the rape victims that the system is tilted against them. Thus, they see aggressive arguments, selective presentation of facts, and psychological attack being permitted on them by the court. They are led to understand that this is done with the presumption that this seemingly hostile encounter offers the better method of arriving at the truth. Victims often perceive that the Constitutional limits on this form of arriving at the truth are totally designed to protect the criminal defendants from the superior power of the government. However, nowhere does it seem to protect the victim from other private citizens.

This is the essence of the disparity of power problem. The judicial process as it appears to a rape victim attempting to seek justice in a civil suit is that the law pretends that there is no disparity in power whether based on age, race, gender, political power, social status, or economic wealth between accuser and accused. Everyone is said to be at the same level of power regardless of the actual advantages that the perpetrator may possess. Thus, victims of violent rape perceive that the judicial process appears to provide a strong defense for the right of their attacker, but does not really protect their rights.

The victims of rape by powerful people tend to see this presumption of power equality as being similar to the "elephant in the room" that people simply agree to pretend is not there. However, common sense suggests that a rapist who is very wealthy, very socially influential, very popular and enormously politically powerful will be able to protect himself from being held accountable by simply terrifying and continuing to intimidate the victim until the statute of limitations expires. Additionally, this factor drastically reduces the likelihood that the victim, who typically has limited resources, can even find a capable attorney who is willing to take on the perpetrator because of the risk, the extensive time commitment and the expense involved to the attorney.

Thus, the powerful perpetrators can effectively eliminate or reduce the risk of exposure to themselves by simply having the victim killed at a later time. A more likely strategy is to simply control the victim by continuing to harass them, to torment them and by causing them to continually fear that they or their loved ones will be killed or otherwise harmed. The end result is that many victims of violent rape by powerful people are seriously impaired in their ability to cope productively for the remainder of their lives. Thus, the life that the rape victim had worked to build is destroyed and they are deprived of the life that would have been as if the perpetrator had killed them during the attack. In essence, for these victims, they are likely to never again feel safe as the rape is never really over for them. This is extremely tragic and unfair because, even though the rapist destroyed the victims' life, the rapist themselves can generally feel safe as soon as the statute of limitations expires. From a psychological stand point it is essential to realize that people typically tend to do what works. Thus, it would be very unrealistic to expect a rapist not to use any and all available resources to protect himself, his family and his reputation.

Therefore, the message to powerful perpetrators is quite simple. It is easy and fairly safe to sexually assault a woman whom they find to be vulnerable. All that they really have to do is to use some of their readily available power and resources to harass, to terrorize and to intimidate the victim until the statute of limitations has expired and then they are home free. Also, there is a secondary benefit to the perpetrator who employs this strategy. This benefit is that since rape is really about terrorizing the victim this strategy simply continues the process of such terrorizing.

In my professional opinion, I believe that these are some of the relevant factors which have resulted in the extremely high percentage of rape victims who either are not psychologically capable of bringing timely charges against their attacker or who fail to seek civil justice within the statute of limitations. I believe that they are a significant factor in the explanation as to why such an extremely large percentage of rape victims simply never report the crime.

In Jacque Hollander's case all of the above discussed factors, with particular regard to the issue of power disparity, are relevant and apply to her inability to seek redress within the stature of limitations. Specifically, her violent rape and continuing long term fear inducing harassment resulted in the subsequent destruction of her personal and professional life. This destructive process along with her long term continual daily fear of death or severe physical harm due to threatened violence resulted in her being extremely traumatized. Thus, she developed basically the same PTSD symptoms as those experienced by torture victims, prisoners of war and by heavy combat veterans.

Very briefly, Ms. Hollander entered treatment full time with me in early 1996. I had previous experience with her treatment as she had been treated by my business associate, since about 1992. During that time, I had seen her on an emergency basis when he was not available and he had consulted with me numerous times regarding her treatment.

Please note that I have been retired from practice as psychologist for some time and I do not have available to me the specific files regarding her treatment. Thus, the dates and details are as I recall them. A brief review of her violent rape along with its induced trauma is as follows:

Sometime, in early 1988, she was the victim of a violent and forcible rape. Her perpetrator used a weapon to cause her to fear for her life and to intimidate her. Further, the man who raped her is a very wealthy and very influential man who has the support of many extremely politically powerful people. Additionally, he is considered to be an icon by many people. Up until she was raped, Jacque had built a very successful career in the world of music and entertainment. At the time of the rape she essentially worked for this individual and he basically held her career in the palm of his hand.

At the time of the rape and afterward, she was told by both the perpetrator and by others in his power structure that her life was of no further value and that she would be killed if she attempted to have him charged with the rape. As I recall, she reported that as an object lesson, she had personally been taken to see the body of a man who had been killed because he posed a threat to this individual. Jacque was justifiably terrified and so she initially denied

that she had been raped. She experienced a number of other violent incidents which happened in connection with this rape and was placed under an enormous amount of long term stress including continual fear for her very life. The result of this rape and her subsequent treatment because of the tremendous power wielded by her rapist was that both her personal and her professional life were destroyed. She lost her career, her money, her husband and her reputation. She became increasingly isolated feeling helpless and hopeless. She developed a severe Post Traumatic Stress Disorder (PTSD) and became increasingly unable to productively cope with her life.

As time went on, she became more and more unable to deal with the emotional distress caused by being raped and by the further victimization by the rapist through the great power disparity which existed between the two of them. She was devastated to find that no one really wanted to hear her charges against this individual once she had regained her psychological resources to the point that she tried to tell what had really happened to her. It took years before she was able to recover psychologically to the point that she could try to fight back. She was unable to try to seek justice until she had been in psychological treatment for some time. The purpose of this treatment was to help her to deal with her PTSD and to gain the emotional and psychological strength to attempt to have her rapist held accountable. This took tremendous courage on her part as she had feared and continued to fear for her life on a daily basis.

In 1995, she began to fight back and she volunteered for and successfully passed a federal polygraph test regarding her allegations about the rape. However, she began to experience even more harassment including threats of bodily harm. From that time she had no moments of real

peace in her life. She continued to be harassed and she continually was in fear for her life. Her fear was increased after her remarriage by her worries about the safety and well being of her new husband. This traumatic situation continued until the year two thousand. At this time, she was relocated to a safe place in the Mid West with her new husband and a loving family. This was the first time in seventeen years that she was no longer in the hostile environment which had been so destructive to her well being. Subsequently, she was diagnosed as having Graves Disease said to be caused by the stress of living in constant fear of death for that seventeen years. In 2005, after years of psychological therapy Ms. Hollander was finally able to file her civil case against the man who raped her.

I would like to note that during my career as a psychologist I had extensive experience working with people who attempted to be deceptive. Additionally, I was a certified peace officer for nearly twenty years with experience as a police officer and as a deputy sheriff in two states. Further, I consulted as a psychologist with a state prison and conducted numerous parole and other evaluations in which I people often lied to me. I mention this experience only to document that I have had extensive experience in dealing with people who were being less than factual with me. I can state that I have worked with Jacque for ten years sometimes having session two or three times a week during extremely trying circumstances and I have never found her to be less than truthful.

I sincerely, hope that this information may be of some value to the court in the difficult process of deciding if she is to be given the opportunity to seek justice in a court of law for the long term destruction of both her personal and her professional life.

Thank you for your consideration of this information. Please let me know if I can be of further assistance in this matter.

Sincerely,

Signed

Lawrence D. Largent, Ph.D.

Licensed Psychologist, Retired.